ed to all its employees, they do not constitute "wages" within the meaning of the EPF Act so as to attract contributions thereunder; the Collective Agreement purely dealing with the accounting and distribution of the service charges and not with the bringing then into existence.

We were referred to *Hotel Biltmore & Ors* v. *Central Provident Fund Board*,[2] a Singapore case, which decided that a share of the service charges is wages within the meaning of Singapore Central Provident Fund Act (Cap.121). In our view *Hotel Biltmore's* case is not relevant to the present appeal because the definition of "wages" under the Singapore Act seems to be more extensive than that in our EPF Act. The full definition under the Singapore Act is as follows:

"'wages' means the remuneration in money, including any bonus, due or granted to a person in respect of his employment."

The words "including any bonus", "granted" and "in respect of his employment" clearly shows that whatever is earned by an employee, be it money due under his contract of service or not, is "wages", so long as that money is obtained "in respect of his employment". Thus since service charges are earned because of his employment, they must be wages, irrespective of the name by which the moneys are designated. This case is therefore irrelevant for the purpose of determining this appeal.

For the reasons given in the preceding paragraphs, we therefore hold that the service charges not being the property of the Hotel, are not remuneration due from the employer to its employees under his contract of service, and are therefore not wages. Thus the appeal is dismissed with costs and the deposit is to be paid to the respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Xavier & Co.; R. R. Chelliah Bros.; Shearn Delamore & Co.*

POON GUAN SDN. BHD. v. SEM SIONG INDUSTRIES SDN. BHD.

[F.C. (Wan Suleiman, Abdul Hamid & Hashim Yeop A. Sani F. JJ.) May 24 & July 28, 1983]
[Kuala Lumpur – Federal Court Civil Appeal No. 31 of 1983]

Landlord and tenant – Termination of tenancy – Provision for termination – Closure of bowling alley – Whether termination valid – Damages.

In this case the respondents had leased the premises to the appellants. It was agreed that if the bowling alley of the respondents was closed for reasons beyond their control, they reserved the right to terminate the tenancy by giving three months' notice in advance. The respondents informed the appellants that the bowling alley would be closed and gave notice to the appellants. The evidence showed that the real reason for closing the bowling alley was the heavy financial losses incurred due to bad maintenance and bad location.

Held: unless a contract clearly specifically so provides, the court will not construe an avoiding provision contained in it in such manner as to permit a party to take advantage of a situation brought about by his own act or omission. In this case the appellants were entitled to a declaration that the tenancy agreement had not been validly terminated.

Cases referred to:

(1) *Peter Dixon & Sons Ltd.* v. *Henderson Craig & Co.* [1919] 2 K.B. 778.
(2) *Tennants Ltd.* v. *Wilson & Co.* [1917] A.C. 495.
(3) *Cheall* v. *Apex* [1982] 3 All E.R. 855.
(4) *New Zealand Shipping Company Ltd.* v. *Societe Des Ateliers Et Chantiers De France* [1919] A.C. 1.

FEDERAL COURT.

T. Thomas for the appellants.

P. P. Royan (*A.D. Sidhu* with him) for the respondents.

Cur. Adv. Vult.

Hashim Yeop A. Sani (delivering the judgment of the Court): The appellant as plaintiff in the High Court sought for a declaration that the tenancy agreement (the terms of which are expressed in a letter dated November 9, 1978 – pp. 81-82 of the Appeal Record) had not been validly terminated. The appellant also sought for an injunction to compel the respondent to restore the airconditioning supply, damages for breach of contract and costs. At the conclusion of the trial the High Court dismissed the claim and allowed instead the counterclaim of the landlord (respondent now) for vacant possession and mesne profits. The appeal before us is against that order.

It is not disputed that the terms of the tenancy agreement are as expressed in the said letter dated November 9, 1978 from the respondent company which confirmed a verbal agreement reached earlier between the Managing Director of the appellant company (PW 1) and the Chief Executive of the Low Yat Group of companies, one Dato Low Yow Chuan (not a witness). The terms of the lease are quite straightforward with rentals for the first three years agreed to at $1,300/- per mensem, the second three years at $1,500/- per mensem and the third three years at $1,700/- per mensem. The rental was inclusive of air-conditioning supply for "the period of operation of the bowling alley" of the respondent company.

Quite early in the proceeding it must have been realised by both counsel and the trial judge that the real issue before the court was the interpretation of paragraph 6 of the said letter dated November 9, 1978 and its application to the facts of the case. Paragraph 6 of the letter reads as follows:—

"OTHERS

In the event of redevelopment of our property whereby the premises is required to be demolished, or our Bowling Alley is closed for reasons beyond our control, we reserve the right to terminate the tenancy agreement by giving 3 (three) months' notice in advance, with no claim for compensation by you except for the period of the first 3 (three) years."

In the middle of the proceeding the learned judge noted and the parties conceded that the first limb of paragraph 6 could not apply. The real issue was thus further reduced to whether on a proper interpretation of the second limb of paragraph 6 of the tenancy agreement the respondent company had the right to terminate the tenancy agreement in the way it did. The second limb reads "or our Bowling Alley is closed for reasons beyond our control".

Purporting to act under the said paragraph 6 the respondent company wrote to the appellant a letter on July 2, 1982 the gist of which reads as follows:—

"We refer to the above matter and wish to inform you that our Sem Siong Bowl Centre will be closed down very shortly. Accordingly, as in accordance with our Agreement we hereby give you 3 months' notice of our intention to terminate your Tenancy Agreement in respect of the above premise.

We will be grateful if you would vacate the premises and hand over the same to us on the October 1, 1982."

The appellant promptly replied on July 9, 1982 (pg. 119) to the effect that since a great deal of money had been expended on the Kentucky Fried Chicken Restaurant in the premises, the appellant wanted further information on the reason the respondent proposed to close down the bowling alley. The rest of the letter dealt with the alleged "systematic attempt" by the respondent to terminate the tenancy for the previous one year for failure to increase the rental, which is not relevant for our present purpose. The respondent replied to this letter on July 17, 1982 (pg. 121) the gist of which reads as follows:—

"We, on our part, can do nothing more but to assure you that *our action is merely a result of our need to achieve a reasonable business income from the premises concerned instead of incurring a substantial loss* at the present moment.

As stated in our letter dated July 2, 1982 it is our intention to close down our Sem Siong Bowl in view of the heavy loss we are incurring every month. We feel it to be premature at the moment to inform you exactly what our plans are with regard to the premises, but suffice to say our plans will involve the demolition of the entire internal area of the premises concerned and the removal of all the bowling equipments. In addition, the major part of the outside building will also undergo extensive renovation work.

Therefore, while we still reserve the right to differ from your "opinion that a mere change of business will not entitle (us) to terminate your client's tenancy", we would assert that from the above facts *our action is not only a mere change of business but also involve major renovation and redevelopment of the premises concerned.*" (emphasis supplied)

It would seem to us that the above letter carries more than one reason and it is also obvious that the respondent purported then to exercise the powers under both limbs of paragraph 6 of the tenancy agreement. We also note that the above letter was written on July 17, 1982 but on July 20, 1982 there appeared an advertisement in the *Malay Mail* of that date to let out the premises concerned (pg. 123). It is also not disputed that the premises was eventually let out to the United Asian Bank on the terms as set out in the letter of an estate agent addressed to the Low Yat Group, the parent company of the respondent company (pg. 130).

The trial judge took the correct approach when he said at pg. 4 of his judgement that "the tenant's case undoubtedly falls or stands as to whether the controversial paragraph applies to the facts or evidence in this case or not". (pg. 69). The learned judge then set out what he considered to

be the three grounds which the respondent sought to justify. The first ground is the declining profits of the bowling alley due to a number of factors. This ground came out in the testimonies as well as in the documentary evidence. The trial judge correctly held that this ground could not be one which was beyond the control of the landlord. In our view the trial judge also correctly rejected what he considered to be the second ground namely the presence of bad elements causing disturbances in the bowling alley. The third ground however found favour with the learned judge and this ground was the purported shortage or non-availability of spare parts. That part of his judgment reads as follows:—

"The allegation of shortage of the spare parts or the inability to obtain spare parts for the machines of the bowling alley has never been really challenged by the plaintiff also. I find on such overwhelming evidence that there were constant breakdowns in the machines of the bowling alley due to difficulty or inability in obtaining the spare parts for them and that the situation of the breakdown was getting progressively worse".

The finding can be divided into two distinct parts. The first part is the finding on constant breakdowns of the machines. The second part is the finding on difficulty or inability in obtaining spare parts. With respect we are of the view that the second part of the finding is against the weight of evidence both in the testimonies of witnesses and the documents produced before the court.

Let us look at the testimonies first. DW 1, the Group Manager of Low Yat Group of companies (the parent of the respondent company) stated that the reason for closing the bowling alley was the "very substantial losses" incurred since the latter part of 1981 (pg. 21). The main causes of these losses were disturbances caused by the bad elements and old equipments for which he said "spare parts very difficult and sometimes impossible to get" (pg. 21). He also said in the latter part of his testimony that the bowling alley ran ten lanes and the other six lanes were not functioning "because we could not get spare parts". The learned judge seems to be satisfied with this part of the evidence without however further examining closely the testimonies of the other witnesses and the documentary evidence. The evidence of DW 3, the Manager of the Federal Bowl (also a member of the same parent company) and Sem Siong Bowl said categorically that to replace the equipments (in Sem Siong Bowl) would cost about $1 million and because of the locality the management had to think of the returns on the investment of $1 million. The management, he said, finally decided not to purchase new machines (pg. 35-36). We consider this statement highly relevant.

The evidence which clearly negates any allegation of non-availability of spare parts can be found in a number of documents produced before the court. First the report by RIADA (pg. 83) blames bad maintenance for the poor functioning of the bowling alley, although admitting also spare parts shortage. Then there is the monthly report of the respondent company itself (pg. 102) which indicates that there was a discussion on spare parts with the management but it is clear from the report that the spare parts were expensive but *not* unavailable. In fact the supervisor of the bowling alley in his letter to the Business and Administrative Manager of the Low Yat Group on April 12, 1982 (pg. 103) stated that he had already ordered some spare parts from RIADA.

In *Peter Dixon & Sons, Ld.* v. *Henderson, Craig & Co.*[1] the subject matter was a contract for the sale of wood pulp to be delivered in certain quantities for the year provided that delivery under the contract might be suspended pending any contingency beyond the control of the parties which prevents or hinders delivery. In the judgment of Bankes, L.J. at pg. 786 *Tennants Ld.* v. *Wilson & Co.*[2] was considered and Bankes L.J. drew as one of rules from *Tennants Ld.* that a rise in price will not in itself constitute a hindrance to delivery.

It can be seen from the report by RIADA in this case that the management of the respondent company was responsible for the bad maintenance of the equipments in the bowling alley. The most telling piece of evidence was given by the respondent's own witness, DW 3, the manager for both Federal Bowl and Sem Siong Bowl. He said that Federal Bowl was doing very well but Sem Siong Bowl was doing very badly. DW 3 and Sem Siong Bowl's machines were old but even with the best machines business would still be bad for Sem Siong Bowl because the bowling alley was situated in a bad locality – pg. 38. In other words this testimony confirms the real reason for closing Sem Siong Bowl i.e. the heavy financial losses incurred due to bad maintenance and bad location. But neither of these reasons is the fault of the appellant. The consultant puts the blame on poor maintenance for the frequent breakdowns of the bowling equipments apart from shortage of spare parts. The management was surely responsible for the location of the bowling alley. Slade L.J. in

Cheall v. *APEX*[3] referred to the reasoning of the speeches in *New Zealand Shipping Company, Ltd.* v. *Societe Des Ateliers Et Chantiers De France*[4]. The underlying principle there is that unless a contract clearly and specifically so provides, the court will not construe an avoiding provision contained in it in such a manner so as to permit a party to take advantage of a situation brought about by his own act or omission.

Lord Atkinson said in the *New Zealand Shipping case* at page 9:-

"But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract."

Lord Finlay L.C. in the same case at page 6, puts it more briefly thus: "It is a principle of law that no one can in such case take advantage of a state of things which he himself produced".

There are other facts of this case we note which also seem to indicate an improper exercise of the power in paragraph 6 of the tenancy agreement. As early as July 17, 1982 in the letter from the respondent replying to the query by the appellant the first reason was disclosed in the first sentence of the letter produced earlier in the judgment that the bowling alley was to be closed because of financial losses. Then almost simultaneously with the writing of that letter the respondent advertised in the *Malay Mail* to let out the said premises. We also note that by letter dated August 21, 1982 (pg. 127) the respondent informed the appellant that the bowling centre would be closed on October 4, 1982 which means that on the date that the notice to quit expired (on August 1, 1982) the bowling alley was still not closed.

We accordingly allow the appeal. We grant a declaration to the appellant that the tenancy agreement has not been validly terminated.

As no evidence was adduced on the application for an injunction we make no order on any injunction.

The claim for damages for breach of contract shall be referred back to the judge for assessment.

Counter-claim by the respondent is dismissed.

Costs to the appellant here and in the court below. Deposit to be refunded to appellant.

Appeal allowed;
Counterclaim by respondent dismissed.

Solicitors: *Skrine & Co.; Shook Lin & Bok.*

KHENG CHWEE LIAN v. WONG TAK THONG

[F.C. (Wan Suleiman, Seah & Hashim Yeop A. Sani F. JJ.) June 8 & July 28, 1983]

[Kota Bahru – Federal Court Civil Appeal No. 179 of 1981]

Contract – Sale of land – Fraudulent misrepresentation – Land transferred to third parties – Compensation – Contract Act, 1950 ss. 13, 15, 16, 17 & 18 – Specific Relief Act, 1950, ss. 13 & 18(3).

Land Law – Sale of half share in land – "Jual putus" – Subsequent agreement for partition – Fraudulent misrepresentation – Compensation.

Practice and procedure – Claim to share in land – Portions of land transferred to third parties – Order for subdivision of land affecting third parties – No jurisdiction to make order – Compensation – Specific Relief Act, 1950 ss. 13 & 18(3) – R.H.C. 1980, O. 45, r. 8.

In this case the respondents had bought a half share in a piece of land from the appellant and had paid the purchase price. Subsequently the respondent was induced to sign another agreement under which he was allocated a small portion of the land. The respondent alleged that he was induced by the false representation of the respondent to sign the second agreement. He applied to the court for a declaration and obtained a declaration that he was the owner of one half of the land and an order that the land be subdivided. Portions of the land had however been transferred to the sons of the appellants. The sons were not parties to the action.

Held: (1) the transaction under the first agreement was a *jual putus* and the consideration had been settled. There was no appeal against the finding of the trial judge on this point;

(2) the learned trial judge was correct in holding that the respondent had been induced by misrepresentation into signing the second agreement and the misrepresentation was fraudulent. The agreement was voidable at the option